THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: ELCS:DHjl 1550268

19 June 2018

Mr Alan Cameron AO
Chairperson
NSW Law Reform Commission
DX 1227 SYDNEY

By email: nsw_lrc@agd.nsw.gov.au

Dear Mr Cameron,

Access to digital assets upon death or incapacity

The Law Society of NSW appreciates the opportunity to comment on the NSW Law Reform Commission ("NSW LRC") review into access to digital assets upon death or incapacity ("the Review"). The Law Society's Elder Law, Capacity and Succession Committee and Privacy and Data Law Committee have contributed to this submission.

Noting the terms of reference for the Review, the Law Society considers that the NSW LRC should consider the following issues as part of the Review:

The need for access

The Law Society submits that it is important for any legislative amendments relating to digital assets to include a recognition of a fiduciary's right to access digital assets. This will be necessary to provide an agent, administrator, attorney or guardian with the necessary tools to discharge their fiduciary obligations for the benefit of the member and to enable a personal representative of an estate to discover and liquidate an asset for distribution to the beneficiaries and creditors of an estate. This should include rights of access, control and copying of the asset (within the extent permitted by relevant copyright laws).

We also consider that it will be important to ensure that any legislative amendments give effect to the explicit wishes and intentions of the member as documented in their will. In the absence of clear and express intention by the member, it is our view that no intention should be imputed unless it is necessary to facilitate the proper management of the member's personal affairs or alternatively the distribution of the member's estate. This will ensure that such provisions adhere to the traditional approach of trusts and estates law, which respects the intentions of the member.

The Law Society considers this as important as it has become increasingly common for assets to exist solely in digital form, or alternatively only be capable of access through digital means. Currently, when a member dies the person in charge of administering and distributing the estate may be required to obtain a court order to compel an electronic data custodian to give the person access to the digital asset in

question. This process can be costly and time-consuming, and given that current legislation offers no guidance for courts to make determinations in relation to these issues, offers no guarantee of success.

We note that many Terms of Service ("TOS") agreements of electronic data custodians prohibit the assignment of a digital account or access to that account by anyone other than the member. Currently, even if a fiduciary is supplied with the member's login details by the member themselves, the fiduciary can face serious legal consequences if they access a member's account as a result of current privacy and telecommunications laws. Further, we note that some TOS agreements also provide for termination of the relevant account upon the death of the member, and that others have procedures in place to deal with the accounts of deceased members – such as by 'memorialising' their account.

Defining a 'digital asset'

We submit that it will be necessary for the term 'digital asset' to be defined in a way that is sufficiently broad to cover the types of assets currently in existence, but also flexible enough to encompass relevant classes or types of assets that may come into existence in the future as technology in this area continues to develop. We note that the *Uniform Access to Digital Assets by Fiduciaries Act* ("the Canadian Model Act") defines a digital asset as being "a record that is created, recorded, transmitted or stored in digital or other intangible form by electronic, magnetic or optical means or by any other similar means."[1] Although we consider that this is the most comprehensive and suitable definition currently utilised, we consider that any definition adopted should appropriately cover any electronic records in which members have a right or interest.

The Law Society is of the view that it will be important for any definition of digital assets to be divided into two sub-classes, depending on whether the assets are of financial or sentimental value. We consider that 'financial value assets' would encompass any digital assets with a commercial value that attach intellectual property rights, attract advertising revenue, or that can be traded, exchanged or redeemed for cash as well as other valuable items. This would include digital currencies, frequent flier points and cash credit in other electronic accounts. We consider that 'sentimental value assets' would comprise digital assets with a sentimental value, such as digitally stored memorabilia including photographs, videos, posts, messages, email and other correspondence.

We submit that this distinction is necessary given the breadth of items that may fall within any ultimate definition of 'digital assets'. Creating this distinction will allow for specific considerations and rules to apply separately to each the classes. We consider that financial value assets could be given the same treatment as tangible property, which under the *Succession Act 2006* (NSW) includes "any valuable benefit"[2], and that sentimental assets could be subject to greater protections and rules that would specifically allow for their access and transmission.

Determining designated or authorised persons

The Law Society is of the view that any legislative provision that provides for access to digital assets also requires an appropriate identification of who is authorised under the legislation to access such assets. We submit that given the intention of accessing

[1] *Uniform Access to Digital Assets by Fiduciaries Act*, s 1.
[2] *Succession Act 2006* (NSW), s 3.

digital assets should be as a means to facilitate the proper management of a member's personal affairs or the distribution of a member's estate, that any corresponding legislative provisions should exclusively confer legal authority on fiduciaries.

The Law Society notes that both the American Uniform Law Commission's *Revised Uniform Fiduciary Access to Digital Assets Act* ("the American Model Act") and the Canadian Model Act recognise the following four types of fiduciaries eligible to access digital assets (if specified requirements are met):

- A personal representative of the deceased's estate;
- A guardian appointed by an account holder;
- An attorney acting under a power of attorney; and
- A trustee.

We consider a classification of fiduciaries to be appropriate for the Australian context. We further consider that it would be appropriate for fiduciaries to be given sufficient opportunity to manage or distribute the assets, which could be determined as necessary on a case-by-case basis. In addition to the above, we also consider that the executor or next of kin for small estates should also be considered as fiduciaries. This is discussed further under the heading "Reseal and fresh grant of Probate" below.

Further, the Law Society is of the view that consideration should be given to the extent to which fiduciaries should be able to control a member's digital assets. In particular we note that if full control over a member's digital assets was given to a fiduciary, this may extend to actions including the sending and receiving of messages and e-mails from a relevant account. We note that this would normally be restricted by the TOS agreement between a member and an electronic data custodian, however we are of the view that a TOS agreement that seeks to limit access to a fiduciary is inappropriate (see "Interaction with Terms of Service agreements" section below).

Privacy limitations to fiduciary access to digital assets

The Law Society submits that a number of privacy considerations will need to be countenanced by legislation, particularly to ensure that members can retain privacy over their digital assets if they wish to do so. It would be appropriate for any legislation governing the area to address circumstances in which a member can indicate that they do not wish for a fiduciary to access their digital assets.

We note that a definition of 'digital assets' will most likely encompass material that is particularly sensitive and personal that a member would not have contemplated being viewed or opened after their death. We submit that a member should not lose the ability to maintain confidentiality in particular electronic material merely because the member elected to hold that material in electronic form. It is the view of the Law Society that any right to maintain confidentiality should be balanced against the desirability of access to digital assets to facilitate the proper administration of a member's personal affairs, the distribution of a member's estate, or the reasonable expectations of family and associates. As an example, we note that digital currencies or other 'financial value assets' may only be accessed by a fiduciary if they have access to a member's electronic accounts. Further, assets with no digital value such as family photo albums (that we would class as 'sentimental value assets') may only (or primarily) exist in electronic form. In these circumstances it would appear

reasonable to assume that a member would generally wish for an electronic photo album to be shared with individuals such as their family members.

In order to strike an appropriate balance, the Law Society considers that any legislation should provide for a presumption of access to a member's digital assets by a fiduciary, but that a clear statement of testamentary intention by the member to limit access in particular ways (for example providing access to specific electronic accounts or to particular material in electronic accounts) should serve to over-ride this presumption. We submit that an access request upon an electronic data custodian should take a prescribed form, which includes appropriate certifications by the fiduciary. Further, we submit that when seeking access, a fiduciary should be required to certify to the electronic data custodian that the right of access is not relevantly limited, or alternatively state how a fiduciary's right of access is qualified or limited by a member. We submit that an electronic data custodian should be entitled to rely upon a properly certified access request.

The Law Society is of the view that if a right of access by a fiduciary is relevantly qualified, and the electronic data custodian is required to take significant active steps to give effect to that qualification, the electronic data custodian should be entitled to payment of its reasonable expenses in furtherance of that request. An electronic data custodian should not be entitled to charge for routine or automated assistance.

We further reiterate that any presumption in favour of access to a member's digital assets should only be legislated so that access is authorised only for reasonable and proper management of a member's personal affairs and distribution of a member's estate. We submit that once any entitlement to use digital assets devolves to a beneficiary, the beneficiary should be entitled to use those digital assets as the beneficiary elects, subject to any stipulations or limitations contained in any testamentary instrument.

For clarity, we note that a right of information privacy generally is extinguished upon death of the person entitled to assert that right. This is because the right of information privacy is regarded as a personal right, protecting an individual's solitude and therefore only required to be exercised during their lifetime. We consider that electronic material will often provide, probably unintentionally, a particularly rich narrative of an individual's personal affairs. A person therefore should have an ongoing ability to 'seal their record', where they clearly wish to do so. A right to 'seal the record' is also consistent with building the digital trust of citizens. It would be unfortunate if citizens were distrustful of holding material in digital form, through fear that the electronic record would be fully open in all circumstances.

Interaction with Terms of Service agreements

The Law Society notes that the relationship between a member (the user) and an electronic data custodian is generally governed by a TOS agreement which will vary from provider to provider as well as between jurisdictions and define how the member's personal information and content is to be handled. Typically, the member will have ownership of all content they have transmitted – including comments, posts, photos, and emails – however, the electronic data custodian may be licensed to use the data in accordance with the TOS agreement.

We consider that it will be necessary for any legislation relating to digital assets to recognise the existence of the relationship between the member and the electronic data custodian and clarify that any TOS agreement that seeks to limit access by a

fiduciary to a member's digital assets will be voided and rendered unenforceable against a fiduciary.

Jurisdictional issues

The Law Society is of the view that a major issue requiring consideration will be overcoming the jurisdictional issues in this area. This is particularly the case given that succession law is governed at the state level in Australia but that many electronic data custodians are domiciled in other countries, placing them outside of the legislative ambit of Australian domestic legislation. The Law Society is aware that similar issues have been recently considered in the United States through the enactment of the *Clarifying Lawful Overseas Use of Data Act*, and that obligations now exist upon organisations to provide information under its custody or control – irrespective of where the data is physically located. We consider that consideration of similar provisions will need to occur in order for any legislative framework to function effectively.

Reseal and fresh grant of Probate

The Law Society notes that probate only gives authority to the executor within a specific jurisdiction (i.e. New South Wales), and that it is costly to either obtain a reseal (in the case of Commonwealth countries) or a fresh grant of probate (for other countries). We consider this to be a disincentive that is often prohibitive. As such, we submit that for digital assets with a purely sentimental value (identified as 'sentimental value assets' above), probate should never be required, particularly as an asset would most likely not be included in the grant in any case. Further, we submit that in relation to small estates – which are currently defined as being an estate to the value of $100,000 or less – probate should not be required to enable an appointed executor or, in the case where there is no will (which is often the case with small estates) – the next of kin, to access the digital assets.

Thank you for considering this submission. Should you have any queries with regard to this submission, please contact Principal Policy Lawyer Jonas Lipsius at [redacted]

Yours sincerely,

[redacted]

Doug Humphreys OAM
President